IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1146 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANJI SUPADIA RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1146 of 1994

MRS SHILPA J UNWALLA for Petitioner No. 1

MR DP JOSHI, APP for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 06/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. By filing this appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 the appellant has challenged legality of judgment dated November 23, 1994 rendered by the Ld. Addl. Sessions Judge, Surat in Sessions Case No. 145/1993 by which he is convicted of the offence punishable under Section 302 of the Indian Penal Code and punished with imprisonment for life and fine of Rs.250/-, in default SI for 15 days.

2. Deceased Kutrabhai Rathod was residing in Gamit Faliya of village Amalsadi, Taluka Mandvi, District Surat. The deceased had undertaken the duty to protect grown up crops in a field situated in village Amalsadi. The appellant was grazing his goats in the field which was being looked after by the deceased and, therefore, an altercation had taken place between them on April 6, 1993. The deceased was staying with his son Budhiyabhai, but on the date of incident i.e. on April 6, 1993 there was some religious function and, therefore, Dudhaliben, who is daughter of the deceased had cooked the food and was going to the house of the deceased for giving the cooked food. It is the case of the prosecution that when she reached near the house of his deceased father, she had seen the appellant and acquitted accused Ramesh Devlo and that an altercation was going on between her father on the one hand and the appellant and acquitted accused Ramesh Devlo on the other. The case of the prosecution is that the appellant had given an axe blow on the head of the deceased, as a result of which the deceased had fallen down and thereafter the deceased was removed to hospital, but had succumbed to the injuries during the course of treatment. Dudhaliben had filed her complaint with Mandvi Police Station which was investigated by Senior Police Sub Inspector Mr. Desai. Mr. Desai had recorded statements of those persons who were found conversant with the facts of the case and had made arrangement for post mortem examination of the dead body of the deceased. Further during the course of investigation panchnama of place of occurrence was prepared and axe was discovered in the presence of independent witnesses pursuant to voluntary disclosure made by the appellant. The articles which were seized during the course of investigation were sent to Forensic Science Laboratory for analysis and report of the Analyst was obtained. On conclusion of investigation, the appellant and acquitted accused Ramesh were chargesheeted of the offences punishable u/Ss. 302, 504 read with section 114 of the Indian Penal Code in the Court of the Ld. Judicial Magistrate First Class, Mandvi. As the offence punishable u/S. 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the case

was committed to the Sessions Court, Surat for trial, where it was numbered as Sessions Case No. 145/1993.

3. The charge at Exh.3 was framed by the Ld. Judge against the appellant and acquitted accused of the offences punishable u/Ss. 302, 405 read with section 114 of the Indian Penal Code. The charge was read over and explained to the appellant as well as the acquitted accused, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dudhaliben Kanjibhai Gamit P.W. 1 Exh.12, (2) Gokulbhai Bhangiyabhai Rathod P.W.2 Exh.14, (3) Budhiyabhai Hirabhai Gamit P.W.3 Exh.15, (4) Budhiyabhai Kutarabhai Rathod P.W.4 Exh.16, (5) Mohanbhai Dhanjibhai Patel P.W.5 Exh. 17, (6) Dr. Navinchandra Revabhai Choudhary P.W.6 Exh.19 and (7) Kuberbhai Mulajibhai Desai P.W.7 Exh. 21, to prove its case against the appellant and acquitted accused. The prosecution also produced documentary evidence such as panchnama of place of incident, inquest held on the dead body of the deceased, report of the Serologist, discovery panchnama regarding axe used by the appellant in commission of crime, post mortem notes of the deceased, the complaint lodged by Dudhaliben, etc. in support of its case against appellant and acquitted accused. After recording of the evidence of prosecution witnesses was over, the Ld. Judge explained to the appellant and the acquitted accused the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code of Criminal Procedure. In their further statements the appellant and the acquitted accused stated that the case of the prosecution against them was false, but they did not examine any witness in support of their defence.

4. On appreciation of evidence led by the prosecution, the Ld. Judge held that it was proved by the prosecution beyond reasonable doubt that deceased Kutarabhai Rathod had died a homicidal death. The Ld. Judge referred to the evidence of Dudhaliben Gamit P.W.1 Exh. 12, Gokulbhai Bhangiyabhai Rathod P.W. 2 Exh.14, Budhiyabhai Hirabhai Rathod P.W.3 Exh.15 as well as Budhiyabhai Kutarabhai Rathod P.W.4 Exh.16 and concluded that their evidence was cogent, consistent and reliable. The Ld. Judge after relying upon the evidence of above referred to witnesses, held that it was proved by the prosecution that the appellant had caused death of the deceased by giving blow with an axe on the head of the deceased. The Ld. Judge held that no reliable evidence was adduced by the prosecution to establish that any blow was given by acquitted accused Ramesh or that he

had abetted the appellant in commission of crime. The Ld. Judge thereafter considered the nature of offence committed by the appellant and held that the appellant was liable to be convicted of the offence punishable u/S. 302 of the Indian Penal Code. In view of the above referred to conclusions, the Ld. Judge has convicted appellant of the offence punishable u/S. 302 of the Indian Penal Code and imposed sentence which is referred to earlier, by judgment dated November 23, 1994, giving rise to the present appeal.

5. Ms. Shilpa J. Unwala, learned counsel for the appellant after taking us through the entire evidence on record, submitted that the evidence of eye witnesses is neither reliable nor cogent and, therefore, the same should not have been relied upon by the Ld. Judge for the purpose of convicting the appellant of the offence punishable u/S. 302 of the Indian Penal Code. In the alternative, the learned counsel pleaded that the incident had not taken place near the house of the deceased as claimed by her daughter, but had happened on the road which is near the house of the deceased as well as the appellant and as before the single blow was given, an altercation had ensued between the appellant and the deceased for about 15 minutes and as the appellant had given only one blow with an axe, the offence committed by the appellant would be punishable under Part I of Section 304 of the Indian Penal Code and the appellant having undergone the sentence of 8 years and 6 months, the punishment undergone by him should be imposed on him for the offence punishable under Part-I of Section 304 of the Indian Penal Code.

6. Mr. D.P. Joshi, Ld. APP for the State submitted that the evidence of four eye witnesses is not only cogent, reliable and trustworthy, but inspires confidence and, therefore, their evidence should be accepted by the Court for the purpose of upholding the conviction of the appellant. In answer to the alternative plea raised by the learned counsel for the appellant, Mr. D.P. Joshi, Ld. APP pleaded that the appellant had given blow with a lethal weapon, namely an axe on the vital part of the body of the deceased, namely head and as the deceased has died shortly thereafter, the offence committed by the appellant would be one punishable u/S. 302 of the Indian Penal Code and not u/S. 304 Part-I of the Indian Penal Code as contended by the learned counsel for the appellant.

7. We have taken into consideration the arguments advanced at the bar and reappreciated the whole evidence

on record. Witness Dudhaliben Kanjibhai Gamit P.W.1 Exh.12 has stated in her examination-in-chief before the Court that on the date of incident she had gone to the house of his father for the purpose of delivery of cooked food and that when she had reached near the house of her father, she had seen that an altercation was going on between her father and the appellant as well as acquitted accused and that the appellant had given an axe blow on the head of her father. The witness has stated that the reason which prompted the appellant to give blow on the head of the deceased was that he was scolded by her father because the appellant was grazing his goats in the field which was being looked after by her father. She has further stated that she had given the complaint and that the acquitted accused Ramesh had also given stick blow on the back of her father. During her cross-examination the witness admitted that she had not stated in her complaint that the acquitted accused had given blow with stick on the back of her father. The witness denied the suggestion made by the defence that she had not witnessed the incident. The witness also stated in her cross-examination that her father was not agitated at all at the time when altercation had taken place between her father and the appellant and that the appellant was agitated. It was also denied by her that she was falsely implicating the appellant because of enmity with the appellant.

8. Witness Gokulbhai Bhangiyabhai Rathod P.W.2 Exh. 14 has stated in his evidence that on the date of incident he was near the place of occurrence and that the appellant had given axe blow on the head of the deceased, whereas acquitted accused Ramesh had instigated the appellant to give an axe blow on the head of the deceased. The witness has claimed that because of the incident he was scared and, therefore, had run away towards Sim and, therefore, he could not see whether the acquitted accused Ramesh Devlo had given any stick blow to the deceased or not. The witness specifically claimed in his examination-in-chief that the incident had taken place at the place which was opposite the house of the appellant as well as house of the deceased. In his cross-examination the witness stated that he had seen the incident from a distance of 5 ft. and at that time he was coming back to his house from Kolivad. The witness denied the suggestion that at the time of incident there was darkness and that he had not witnessed the incident.

9. Witness Budhiyabhai Hirabhai Gamit P.W.3 Exh.15 has stated in his examination-in-chief that he is residing in Gamit Faliya of village Amalsadi, which is

also known as Nishal Faliya and that deceased Kutarabhai was staying near the well. The witness has further stated that at about 7.45 p.m. he was returning from his field and at that time he had witnessed that a quarrel had taken place regarding grazing of goats between the appellant and the deceased and that the appellant had given an axe blow on the head of the deceased. The witness has claimed that he had witnessed the incident from a distance of 5 ft. and that Gokulbhai and Dudhaliben had also witnessed the incident. The witness has further claimed that the acquitted accused Ramesh was also there and he was armed with a stick. According to this witness, on sustaining injury the deceased had fallen down and as he was scared, he had run away from the place of incident and that his statement was recorded on next day. In cross-examination the witness denied the suggestion of the defence that he was cousin of Dudhaliben. The witness admitted that he had not stated in his police statement that the incident had taken place between the houses of the appellant and deceased Kutarabhai. The witness admitted that when he was returning home from his field, he had noticed that a quarrel was going on between the appellant and the deceased. The witness denied the suggestion that Dudhaliben and Gokulbhai had come on the place of the incident subsequently i.e. after the incident was over. The witness also stated that he had not informed his wife about the incident.

10. Witness Budhiyabhai Kutarabhai Rathod P.W.4 Exh.16 is the son of the deceased. He has stated in his substantive evidence before the Court that at about 7.45 p.m. on the date of incident he was passing on the road and that he had witnessed that the appellant had given an axe blow on the head of his deceased father. The witness has stated that at that time the acquitted accused Ramesh was also there and that he had given a stick blow on the back of his father. According to this witness, the appellant was grazing goats in the field which was being looked after by his father and therefore, a quarrel had taken place. The witness has informed the Court that his father was removed to Mandvi Government dispensary in the motor car of one Vallabhbhai of his village and that his sister Dudhaliben had lodged complaint with Mandvi Police Station. In his cross-examination the witness denied the suggestion that he was not present at the time of incident and that he in the company of Dudhaliben and Gokulbhai had come to the place of incident after the incident was over. The witness admitted that before the actual incident of giving of blow on the head of the deceased had taken place, a quarrel had taken place

between his father and the appellant and that the quarrel had continued for about 10 to 15 minutes. The witness in his cross-examination admitted that neither he nor Dudhaliben nor Budhiyabhai had intervened in the incident. According to this witness, after his father was injured, he had requested Vallabhbhai of his village to remove his injured father in his car to the hospital. The witness also claimed that he had also gone with his sister Dudhaliben at the police station, where complaint was given by his sister. The witness denied that he had not stated in his police statement that the appellant had given blow with an axe on the head of his father in front of the house.

11. A reasonable reading of the evidence above referred to four eye witnesses makes it more than clear that they had witnessed the incident and have narrated the incident as they had seen. There are no major contradictions appearing in their evidence and nothing has been brought on record to discredit their evidence. We may state that witness Dudhaliben Gamit P.W.1 Exh.12 and witness Budhiyabhai Kutarabhai Rathod P.W.4 Exh.16 are near relatives of the deceased. Therefore, they would not allow the real culprits to go scot-free and would not involve the appellant in such a serious offence more particularly when defence has failed to establish that there was any enmity between the witnesses and him. Further two other eye witnesses, namely Gokulbhai Bhangiyabhai Rathod P.W.2 Exh.14 and Budhiyabhai Hirabhai Gamit P.W.3 Exh.15 are totally independent witnesses. They have no reasons to depose falsely against the appellant. It is not suggested to these independent witnesses that they are on enimical terms with the appellant. As the evidence of eye witnesses is found to be cogent, consistent and reliable, we are of the opinion that the Ld. Judge did not commit any error in placing reliance on their evidence for the purpose of coming to the conclusion that the appellant was the author of the injury which was caused to the deceased.

12. This brings us to the question as to which offence is committed by the appellant. The record of the case and more particularly the map of place of offence produced on record of the case at Exh.13 shows that the incident had taken place on public way and not near the house of the deceased as is claimed by his daughter and son. The map of the place of incident makes it more than evident that electric pole is situated at a distance of 31 ft. from the actual place of incident. As admitted by witness Budhiyabhai Kutarabhai Rathod P.W.4 Exh.16 who is the son of the deceased, before the axe blow was

delivered by the appellant, a quarrel between the appellant and deceased had taken place regarding grazing of goats by the appellant and that the said altercation had continued for a period of 10 to 15 minutes. As observed earlier, the electric pole is at a distance of 31 ft. and it is difficult to conclude that sufficient electric light of the electric bulb was available at the place where the incident had taken place. In such circumstances when one blow is given by the appellant on the deceased, it is reasonable to hold that the appellant had not selected the site of the injury. The doctor who had performed post mortem examination has noted that there was only one injury on the head of the deceased; meaning thereby only one blow was given by the appellant on the head of the deceased. Taking totality of the circumstances appearing in the case, we are of the opinion that it is difficult to cull out intention on the part of the appellant to cause death of the deceased and, therefore, the offence committed by the appellant would not be one punishable u/S. 302 of the Indian Penal Code, but would be punishable under Part-I of Section 304 of the Indian Penal Code. Therefore, the conviction of the appellant deserves to be altered to one punishable u/S. 304 Part-I of the Indian Penal Code.

13. For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant u/S. 302 of the Indian Penal Code recorded by the Ld. Judge is set aside and instead he is convicted of the offence punishable under Part-I of Section 304 of the Indian Penal Code. The record of the case shows that the appellant has undergone actual imprisonment of 8 years and 6 months and with remissions, imprisonment of more than 10 years. Therefore, we are of the opinion that interest of justice would be served if the appellant is punished with imprisonment which he has already undergone, while holding that he is liable to be convicted of the offence punishable under Part-I of Section 304 of the Indian Penal Code. Accordingly, for the offence punishable u/S. 304 Part-I of the Indian Penal Code the appellant is punished with imprisonment which he has already undergone. As the appellant has undergone the imprisonment which is imposed on him for committing offence punishable u/S. 304 Part-I of the Indian Penal Code, the authorities are directed to release the appellant forthwith from jail unless his presence is needed with reference to any other case. The appeal is accordingly partly allowed.

The Muddamal articles to be disposed of in terms of directions given by the Ld. Judge in the impugned judgment.

The office is directed to send the writ to the authorities forthwith.

[J.M. PANCHAL, J.]

[AKSHYA H. MEHTA, J.]

* Pansala.